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Sent: 10/1/2018 12:46:16 PM
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Subject: Re: Maine, EPA At Odds Over Remedy In Closely Watched Water Standards Suit | InsideEPA.com

It has voluminous attachments and DOJ is having a hard time downloading it.

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On Oct 1, 2018, at 8:15 AM, Dunn, Alexandra <dunn.alexandra@epa.gov> wrote:

Pls send PIN brief from 9/28 when obtained.

<https://insideepa.com/water-policy-report/maine-epa-odds-over-remedy-closely-watched-water-standards-suit>

Maine, EPA At Odds Over Remedy In Closely Watched Water Standards Suit

EPA and Maine officials are at odds over how a federal court should proceed in closely watched litigation over the agency's 2015 rejection of some of the state's water quality standards (WQS), adding to the debate over how or whether regulators should set standards that protect water uses, including "sustenance" or "subsistence" fishing.

The suit is also reviving questions about whether district courts may vacate an agency decision without first ruling on the merits -- an issue on which courts are split.

In a recent filing with the U.S. District Court for the District of Maine in *Maine v. Wheeler*, state officials urged the court to vacate EPA's 2015 rejection of some of the state's WQS, a step that goes further than the agency's request for remand of the issue while it reconsiders its position on how best to set the standards. *Relevant documents are available on [InsideEPA.com](https://insideepa.com). (Doc. ID: 215427)*

"Maine opposes remand without vacatur, particularly with respect to the EPA interpretations and decisions creating a new designated use of tribal sustenance

fishing, because it would allow the challenged decisions, which EPA has now disavowed, to remain in effect indefinitely causing ongoing regulatory disruption and harm to Maine," the state says.

"The Court should instead vacate the challenged decisions in its remand order, thereby restoring the status quo as it existed prior to EPA's 2015 actions with respect to Maine's designated uses of its waters while the agency undertakes reconsideration."

The suit has drawn national attention, with a coalition of industrial companies, municipal entities and agricultural parties urging the court earlier this year to set aside EPA's 2015 WQS decisions for Maine, saying that if the agency uses a similar rationale in other states it could lead to unlawfully stringent effluent limits in discharge permits.

EPA in July asked the court for a voluntary remand of its 2015 decisions, following failed settlement discussions with Maine. The agency said that instead of moving forward with the litigation and filing a merits brief in the case, it has decided to change its position, and not to defend its prior decisions about the state's WQS.

These decisions include: interpreting and approving Maine's fishing designated use in its WQS to mean sustenance fishing in the waters in the Maine tribes' reservations and trust lands; approving provisions in the Maine Implementing Act as a sustenance fishing designated use under the Clean Water Act (CWA) in the inland waters of the Penobscot Indian Nation's and Passamaquoddy Tribe's reservations; and disapproving Maine's human health criteria in its WQS as not sufficiently protective of the sustenance fishing designated uses in Indian waters.

District courts are split on whether a court may vacate an agency decision without first issuing a ruling on the merits. Some courts have held that it is within the court's equity jurisdiction to vacate agency action without making a decision on the merits, Maine's brief says. But other courts have reached the contrary conclusion, holding that the court may not vacate the decision without an affirmative finding that the agency erred, the Sept. 14 brief says.

Courts that have vacated agency decisions in these circumstances "have done so based on consideration of the apparent problems with the challenged decision, weighed against any harm, including any disruptive consequences, that would flow from vacatur," Maine says.

In this case, the court needs not to delve into the merits in order to appreciate that serious problems exist with the challenged decisions, the state argues.

The challenged decisions create new tribal and non-tribal sub-classes of Maine waters that Maine itself never created and believes are unlawful, the state says.

"Leaving those challenged decisions intact while EPA commits to changing them and the underlying interpretations creating the sustenance fishing designated use will disrupt Maine's management of its waters in other important regulatory contexts that involve evaluation of Maine's designated uses for purposes other than establishing water quality criteria," Maine argues.

Additionally, leaving the challenged decisions in effect while EPA explores how to change them will also lead to confusion and potential litigation over which water quality standards and designated uses are in effect during the remand, Maine says.

"It makes no sense for state and federal regulators to be enforcing compliance with standards and designated uses they know to be based on a flawed decision and subject to change," the brief says. "Likewise, it would be inequitable to require members of the regulated community to order their lives around legally suspect standards and designated uses that are bound to change."

Vacatur would restore the status quo as it existed before the issuance of the challenged decisions in 2015, but with safeguards in place for affected tribal waters as a result of the federal criteria in EPA's Maine Rule, the Maine-specific WQS rule EPA promulgated in 2016, the state says.

"Vacatur is the only way to provide clarity and regulatory certainty during the remand without giving enduring legal effect to the flawed decisions that EPA has disowned and vowed to correct," Maine says.

The Penobscot Nation is scheduled to file its response to EPA's request for remand Sept. 28 and has said it intends to oppose EPA's request. The tribe, which is an intervenor-defendant in the case, asked the court in July to allow it to file a counterclaim to Maine that its right to take fish for sustenance within its historic treaty reservation is an expressly retained sovereign right, protected under principles of federal Indian law as a treaty right.

Maine, in a separate Sept. 14 filing with the court, says that if the court remands EPA's decision with vacatur, the tribe's motion must be denied "because

remanding the claims raised in Maine's Complaint would leave the Court with no jurisdictional basis over the proposed counterclaim." -- *Lara Beaven*

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